APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF MONTANA.

No. 1659.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
a National Banking Corporation, *Plaintiff*,

vs.

C. M. BAIR, *Defendant*.

The motion for judgment on the pleadings by defendant came on regularly for hearing under Rule 40 (2) of this court. Briefs were duly submitted by counsel for the respective parties, and have been carefully considered by the court.

It seems to be a rule that a former judgment in an action between the same parties, tried upon its merits, upon the same subject matter, is a bar to another action on the same cause of action, but is no defense to a cause of action on the same subject matter accruing after the rendition of the former judgment. Jones *v.* City of Petaluma, 36 Calif. 230, cited in State *v.* Farinus, 9 N. W. 724, 28 Minn. 175. Also Takekawa *v.* Hole, 121 Pac. 296, 297, holding: "It can not be said that, upon the face of the record in the former case, the rights of the parties as to the modified agreement could have been or were adjudged."

It seems to the court that the facts in this case afford an example of a novation, and present a different cause of action arising out of the same subject matter; and so, the court being duly advised, and good cause appearing, the motion for judgment on the pleadings is hereby denied.

CHARLES N. PRAY,
Judge.

Filed Jan. 11, 1937. C. R. Garlow, Clerk.

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No. 1659.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Corporation, *Plaintiff*,

vs.

C. M. BAIR, *Defendant*.

Sometime ago a motion for judgment on the pleadings was filed by defendant's counsel in the above entitled action. Arguments were made by counsel for the respective parties and voluminous briefs submitted, and at length an opportunity was found to peruse these briefs and examine the authorities cited, with the result, that the main transactions set forth in the complaint, in the opinion of the court, plainly disclosed a novation, requiring the court to deny the motion for judgment on the pleadings. This motion was based upon the admitted facts as shown by the pleadings. Later on the case was tried to the court without a jury, by stipulation of counsel, and, from consideration of the evidence resulting therefrom there does not appear to be any change in a material sense in the basic facts upon which the court determined the merits of the motion for judgment on the pleadings theretofore made. The outstanding facts in the case, which seem to be beyond dispute, are that the payment of ten thousand dollars and the giving of a new note to plaintiff by defendant was the consideration for the dismissal of the suit in Yellowstone County, Montana. The payment of the money, giving of the note and stipulation were simultaneous acts of the parties. The entry of a judgment of dismissal in the Yellowstone County suit at a later date in no particular altered the case, as the court understands it.

The supplemental brief filed herein June 30th, 1938, prompted by the appearance of Erie Railroad Company *v.* Tompkins, 82 L. Ed. 787, 58 Sup. Ct. Rep. 817, has been read by the court and considered in connection with the new

authority, the Montana cases cited, and the reply brief, and so far as the court can see the arguments heretofore made by counsel have not been changed in any important particular.

This case furnishes a notable instance of what can sometimes be accomplished by able and adroit counsel under the rules of pleading and practice in postponing the inevitable day of judgment, even under a state of facts, supported by authorities, that appear to be clear and convincing.

In the opinion of the court the plaintiff is entitled to judgment in its favor, and such is the order of the court. The findings of fact and conclusions of law submitted by plaintiff are hereby approved and adopted, and defendant is allowed an exception thereto.

CHARLES N. PRAY,
Judge.

Filed Sept. 10, 1938. C. R. Garlow, Clerk.

SECTIONS 9379 AND 9455, REVISED CODES OF MONTANA, 1935.

9379. *Powers of referee on the trial.* The trial by a referee of an issue of fact, or of an issue of law, may be brought on for hearing upon notice of the referee and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner as where the trial is by the court without a jury. The referee exercises, upon such a trial, the same power as the court to grant adjournments, to preserve order, and punish the violation thereof. Upon the trial of an issue of fact, the referee exercises also the same power as the court, to allow amendments to the summons or to the pleadings; to compel the attendance of witnesses by attachment; and to punish a witness for contempt of court, for non-attendance, or refusal to be sworn, or to testify. Upon the trial of an issue of law, the referee exercises the same power as the court, to permit a party in fault to plead anew or amend; to direct the action to be divided into two or more actions; to award costs, and otherwise to dispose of any questions arising upon the decision of the issue referred to him. The powers conferred by this section are exercised in like manner and upon

like terms as similar powers are exercised by the court upon a trial.

9455. *Proceedings to compel debtor to appear—in what cases he may be arrested—what bail may be given.* After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.

"The present Code of Civil Procedure of the State of New York, in section 2459, provides that a judgment debtor or officer of a corporation, required to attend in its behalf, being a resident of the state or having an office within the state, for the regular transaction of business, in person, cannot be compelled to attend, at a place without the county wherein his residence or place of business is situated. This provision is a re-enactment of some of the language of section 292 of the Code of Civil Procedure of 1877; but it cannot be considered that such a provision is binding upon the United States court. If an execution could properly be issued to the United States marshal for the Eastern District

of New York, and an order for examination can be had within the territory over which the execution would run, then the order for examination would certainly be effective throughout the Eastern District of New York, and would include more than one county. It could hardly be said that, in adopting the procedure of the State Code, Congress had intended to limit the jurisdiction of the United States court in the extent of execution of its own process geographically, for the boundaries of the United States courts are defined by sections of the Revised Statutes creating the courts, and process runs accordingly. Further, the New York Code, providing that witnesses may be summoned, has given the United States courts, under the adoption of this section, authority to summon witnesses, and in civil cases, under the provisions of section 876 of the Revised Statutes (U. S. Comp. St. 1901, p. 667), subpoenas may run within 100 miles. The most that can be urged would be that inasmuch as the New York Code limits the running of subpoenas of the state courts in supplementary proceedings to a county throughout whose territory execution can be issued, by analogy the United States court could only subpoena witnesses to attend throughout the district over which the United States marshal has jurisdiction to levy an execution; but legislating by analogy from other statutes is hardly a function of the court, and inasmuch as the subpoenas of the United States courts are especially given authority within a radius of 100 miles, in civil cases, it does not seem that this court should limit the right of subpoena in a particular kind of case, because of similarity of legislation in the state of New York, when the New York statute is not expressly applicable."

Meyer *v.* Consolidated Ice. Co. (Circuit Court, E. D. N. Y.), 163 Fed. 400 at pp. 403-404.